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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE DAVID RANKIN,

Defendant and Appellant.

C065011

(Super. Ct. No.  
CM031684)

Defendant George David Rankin pleaded no contest to possession for sale of methamphetamine and possession for sale of marijuana. He asserted on appeal that the trial court erred by not holding a third in camera *Marsden*<sup>1</sup> hearing when he sought to withdraw his plea. We previously concluded the trial court did not err in declining to hold a third closed *Marsden* hearing

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<sup>1</sup> *People v. Marsden* (1970) 2 Cal.3d 118, 123-126 (*Marsden*).

because the trial court had already investigated defendant's similar complaints about his attorney in two prior closed *Marsden* hearings.

The California Supreme Court granted review and subsequently transferred the matter back to us with directions to vacate our decision and to reconsider the cause in light of *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*). Pursuant to the directions of the California Supreme Court, we vacated our prior decision on February 2, 2012, and we have reconsidered this matter.

Consistent with the holding in *Sanchez*, we conclude the trial court did not err when it did not conduct a third *Marsden* hearing because defendant did not clearly indicate that he wanted to replace appointed counsel at the time he sought to withdraw his plea. (*Sanchez, supra*, 53 Cal.4th at pp. 89-90.)

We will affirm the judgment.

#### BACKGROUND

Shortly before 1:00 a.m., two police officers observed defendant driving a pickup truck that appeared to have been in a recent traffic collision. According to one of the officers, the truck was barely running, there was smoke coming from it, and there were shrubs hanging from the front of it. On closer examination the officer noticed gashes in the hood, transmission and radiator fluid leaking onto the ground, and other dents on the truck. Defendant told the officer he had not been in an accident and "the damage to the vehicle was probably done before he borrowed it from the owner."

Another officer smelled a strong odor of marijuana coming from the cab of the truck. In a search of a backpack found on the passenger floorboard, officers found several baggies of methamphetamine and marijuana along with "indicia of sales." Defendant denied that the backpack belonged to him.

The registered owner of the truck was called to the scene. He denied any knowledge of the backpack. The owner also said he loaned the vehicle to defendant about an hour earlier and it did not have any damage at that time. Another witness said defendant had a backpack when he borrowed the truck.

Defendant was charged with possession for sale of methamphetamine and marijuana, with enhancements for two prior prison terms.

Prior to the preliminary hearing, defendant's trial attorney filed a motion to suppress evidence. At the conclusion of the preliminary hearing, the trial court denied the motion, ruling that defendant did not have a reasonable expectation of privacy in the backpack and that, in any event, "the totality of the circumstances supports the reasonableness of the search."

At the next hearing, defendant made a motion to substitute his court-appointed attorney. During an in camera hearing, defendant complained that he did not feel his attorney was prepared for the preliminary hearing and that, as a result, the suppression motion had been denied. In addition, defendant raised a number of other complaints: he had not received a copy of the discovery; audio and video tapes of the incident had not been viewed; they did not have a "private investigator"; and his

attorney did not call "the other witness citizen" to testify at the preliminary hearing on the issue of consent to search the truck. Defendant informed the court that he wanted to file several motions, including a motion for a private investigator, a discovery motion, and a *Pitchess*<sup>2</sup> motion. After the defense attorney responded to each of defendant's complaints, defendant stated that his only disagreement was regarding the decision whether to file a *Pitchess* motion. The trial court denied defendant's request for new appointed counsel.

At a subsequent hearing, defendant pleaded no contest to possession for sale of methamphetamine (Health & Saf. Code, § 11378) and possession for sale of marijuana (Health & Saf. Code, § 11359). He also admitted having served a prior prison term. (Pen. Code, § 667.5, subd. (b).) Prior to entering his plea, defendant told the trial court that he received some threatening letters while in jail but they did not affect his decision to enter the plea.

The trial court scheduled a sentencing hearing, but then continued the hearing for several weeks to allow defendant to pursue a motion to withdraw his plea. At the next scheduled hearing on March 23, 2010, defendant made a second motion to substitute his appointed counsel and the trial court set the matter for a *Marsden* hearing two days later.

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<sup>2</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); Evid. Code, § 1043.

During the closed *Marsden* hearing, defendant revisited his complaints about his attorney's alleged lack of preparation for the preliminary examination and his failure to file a *Pitchess* motion, and also objected to the fact that he had not been provided an opportunity to view the evidence until "recently." In addition, defendant complained that his attorney had not investigated his disabilities or his receipt of threatening letters while in jail. Defendant also objected to his attorney "openly discuss[ing] [his] case" in the presence of another inmate when they were last in court, stating that his attorney "went back and forth" to the point that defendant was "confused . . . and in fear of not taking th[e] deal." The trial court advised defendant that they were not there to rule on defendant's motion to withdraw his plea, only on whether his attorney should be relieved for providing inadequate representation.

After defendant's attorney responded to defendant's complaints, the trial court denied the *Marsden* motion. It set the matter for a hearing five days later on defendant's motion to withdraw his plea. Defense counsel asked if it was necessary to appoint separate counsel for that and the trial court replied, "No."

At the scheduled hearing, the trial court continued the matter for four weeks to allow defendant time to retain private counsel. At the next hearing on April 27, 2010, defendant did not appear with new counsel and the trial court declined to continue the matter further. The trial court proceeded with

defendant's motion to withdraw his plea, observing that it had already heard defendant's *Marsden* motion.

As explained by his attorney, defendant's motion to withdraw his plea was based on complaints raised during his prior *Marsden* motions, including: his attorney's "failure" to file a suppression motion; the fact that defendant had not seen the discovery or the recording of the encounter with police officers that led to his arrest; and his attorney's failure to file a motion to withdraw his plea. Defendant was asked whether there was any other basis for his request to withdraw his plea. He responded that he wanted to "get [his] day in court to try to exonerate" himself and that he believed if his case had been properly investigated and prepared, he would have received a more favorable outcome. He also suggested that his attorney should have sought a rehearing of the suppression motion pursuant to Penal Code section 995. The trial court denied defendant's motion to withdraw his plea, denied probation and sentenced him to state prison for a term of four years.

Defendant obtained a certificate of probable cause.

#### DISCUSSION

Defendant argues that the trial court erred by failing to hold another closed *Marsden* hearing when he moved to withdraw his plea based on ineffective assistance of counsel. He maintains that any time a defendant expresses "post-conviction . . . dissatisfaction with counsel," this "triggers a duty by the trial court to hold a closed hearing under *People v. Marsden*

to determine whether substitute counsel should be appointed to bring a motion to withdraw the plea.”

When a criminal defendant indicates, after conviction, a desire to withdraw his plea on the ground that his current counsel provided ineffective assistance, a trial court is obligated to conduct a *Marsden* hearing on whether to discharge counsel for all purposes and appoint new counsel only when there is some clear indication by defendant, either personally or through his current counsel, that defendant wants a substitute attorney. (*Sanchez, supra*, 53 Cal.4th at pp. 89-90.) “[W]e will not find error on the part of the trial court for failure to conduct a *Marsden* hearing in the absence of evidence that defendant made his desire for appointment of new counsel known to the court.” (*People v. Richardson* (2009) 171 Cal.App.4th 479, 484.)

Following his conviction and prior to sentencing, defendant sought to withdraw his plea based on ineffective assistance of counsel and also made a *Marsden* motion to remove counsel. The trial court conducted an in camera *Marsden* hearing, making sure to give defendant ample time to discuss his concerns. It denied the motion, finding that his attorney’s representation had not been inadequate. The trial court set the matter for a hearing five days later on defendant’s motion to withdraw his plea, stating that it was not necessary to appoint separate counsel. At that point, the trial court had met its obligation to conduct a *Marsden* hearing prior to proceeding with defendant’s motion to withdraw his plea based on ineffective assistance of counsel.

Thereafter, the trial court continued the hearing on defendant's motion to withdraw his plea because defendant sought time to retain private counsel, given that his efforts to obtain substitute appointed counsel had failed. But the mere fact the hearing was delayed did not transform defendant's motion to withdraw his plea into an implied request for substitute appointed counsel. Defendant did not state that anything had happened during the five-week delay between the *Marsden* hearing and the hearing on the motion for withdrawal of the plea that necessitated yet another *Marsden* hearing. He did not seek to substitute appointed counsel at the hearing, only to withdraw his plea based on nothing more than his prior complaints about appointed counsel.<sup>3</sup>

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<sup>3</sup> Of course, when defendant indicated at the plea withdrawal hearing that he was still trying to obtain private counsel, that was not akin to an indication that he wanted a substitute appointed attorney within the meaning of *Marsden* and *Sanchez*. A *Marsden* motion involves the substitution of appointed counsel for different appointed counsel. A defendant who makes a *Marsden* motion must show good cause for replacing appointed counsel because a defendant's right to appointed counsel does not include the right to demand appointment of more than one counsel. (*People v. Ortiz*, (1990) 51 Cal.3d 975, 980, fn. 1.) Substitution of appointed counsel threatens to waste public resources by creating "duplicative representation and repetitive investigation at taxpayer expense." (*Id.* at p. 986.) Free substitution as a matter of right would present an "undesirable opportunity to 'delay trials and otherwise embarrass effective prosecution' of crime [citation]." (*Ibid.*, quoting *People v. Williams* (1970) 2 Cal.3d 894, 906.)

In contrast, where a defendant seeks a continuance in order to replace appointed counsel with *retained* counsel, no *Marsden* hearing is necessary. (See *People v. Courts* (1985) 37 Cal.3d 784, 790.) "The standards for evaluating such requests [to



Under the circumstances, another *Marsden* hearing was not required and the trial court did not err in not conducting one.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_, MAURO, J.

We concur:

\_\_\_\_\_, RAYE, P. J.

\_\_\_\_\_, ROBIE, J.

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substitute one appointed counsel for another appointed counsel] are quite different than those used in the retained counsel context.” (*Id.* at p. 795, fn. 9.)